IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JDUGMENT NO. 87 OF 2003
IN
SUMMARY SUIT NO. 3326 OF 2002.

Rupal Rupesh Shroff. ..Plaintiff.

VERSUS.

Collins & Co., & Ors. ..Defendants.

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Vinay Sonpal Advocate for the plaintiffs.

N. Amin Advocate for the defendant Nos. 1 & 2.

None for the defendant Nos. 3 to 5.

Coram: V.M.KANADE, J.
Date: 30th August, 2004.

P.C.

1. Heard the learned counsel appearing on behalf of the plaintiff and learned counsel appearing on behalf of the defendant Nos. 1 & 2.

2. Present suit is filed for the goods sold and delivered. The plaintiff has taken out the Summons for Judgment after the appearance was filed by the defendant Nos.1 & 2. The total claim of the plaintiff is for an amount of Rs.1,47,631.33 which is the liability due and arising out of the bills for supply of goods and services on a written contract. A reply has been filed by the defendant Nos.1 & 2 in which they have sought leave to

defend. It is contended that the defendant Nos. 3, 4 & 5 are sued in their capacity as partners of Defendant No.1. It is submitted that Defendant Nos. 3 to 5 are not the present partners of Defendant No.1 firm and that Defendant Nos.3 & 5 had resigned from the partnership on 31st March 1992, while Defendant No.4 resigned from Defendant No.1 on 31st March 2002, before the present suit was filed. It is stated that this fact was brought to the notice of the plaintiff through the Letter of Defendants' Advocate dated 9th December 2002, which was duly received. However, the plaintiff has neglected to delete the names of the Defendant Nos. 3 to 5. It is further stated that though a notice was given to the plaintiff's Advocate to give inspection of the original documents, inspection was not given. Further it is stated that the plaintiff has claimed interest at the rate of 30% per annum which rate of interest was never agreed between the parties and, therefore, the suit is not maintainable under Order-XXXVII of the Code of Civil Procedure, 1908. It is further stated that from the face of the documents it would be seen that there was no concluded contract as the materials supplied to the defendants was subject to the approval as specifically stated in the Delivery Challan and the materials were received subject to the approval. It is further stated that the plaintiff's husband was

orally informed to take back the materials as the material was not as per the specification required by the defendants. It is further submitted that there are triable issues and the defendants have reasonable defense supported by the documents and therefore the unconditional leave to defend should be granted.

3. The plaintiff has filed their reply to the affidavit filed by the defendant. It is stated that the averments regarding the retirement of the Defendant Nos. 3 & 5 on 31st March 1992 and alleged retirement of Defendant No.4 on the 31st March 2002 should not be taken into consideration as it is raised by Defendant No.1. It is further stated that Defendant Nos.3 to 5 have not filed their appearance upon service of the writ of summons on 25.11.2002. It is stated that inspection of records was taken by the Plaintiff at the Office of the Registrar of Firms and it was found that Defendant Nos. 3 to 5 are still partners of Defendant No.1. Even as regards Defendant No.4 who is allegedly to have retired on 31st March 2002 the goods were supplied to the defendants prior to the said date and, therefore, Defendant No.4 is also jointly and severally liable.

4. Learned counsel appearing on behalf of the

defendant submitted that there is no concluded contract and apart from that there is variation in the contract which is clear from the fact that in the invoice Challan in paragraph No.3 it is stated that the period of credit would be 15 days and the interest would be charged at the rate of 30% if the bills are not paid within 15 days, whereas in the suit it is stated that the credit period of 60 days would be given failing which the interest at the rate of 30% per annum would be charged. It is further stated that the delivery challan specifically stated that the goods would be received on approval. It is submitted that the goods were defective and that though the plaintiff was asked to take back the goods they were not taken back and therefore the goods were sold as scrap in the year 2004. It is further submitted that the terms of the contract are not concluded as the plaintiff on his own showing has clearly pleaded in the plaint that there is variance in the contract. He has submitted that under the circumstances, the summary suit is not maintainable. Learned counsel appearing on behalf of the defendant relied upon the judgment of Delhi High Court in the case of **Nita Agarwal V/s. R.L.Gupta (Citation:2002-DLT-95-167: 2002-AD(Del)-2-956).** He referred to the observations made by the Court which has after taking into consideration the judgment of the Supreme Court of India held that in the

event the defendant satisfies the court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend. In the said case also the goods were found defective and the court had held that the question was a matter of evidence. In my view, the submissions made by the learned counsel appearing on behalf of the defendant cannot be accepted. So far as the quantum of interest is concerned, it is open for the plaintiff at the subsequent stage either to give a part of his claim of interest, if he so desires. However, on that ground it cannot be said that the suit itself is not maintainable.

5. In my view, no triable issue has been made out by the defendants. The defendants accepted the goods, and for the first time in the year 2004 when the suit was on board for hearing, it has been alleged, in writing, that the goods were defective. So far as the issue of the retirement of the partners, viz., Defendant Nos.3 to 5 is concerned, that cannot be a defense, as the plaintiff in his reply has pointed out that the said defendants still continue to be the partners of the Defendant No.1 - Firm on the records of the Registrar of Firms when inspection was taken by the plaintiff. In any case, Defendant No.4 was partner when the goods were supplied.

6. So far as the question regarding interest is concerned, which is charged at the rate of 30% per annum, that can be considered at the time of hearing of the suit. In a judgment of the Full Bench of this Court reported in **AIR-2004 BOMBAY 186 (SICOM Ltd V/s. Prashant S. Tanna,** it is observed in paragraphs 12, 13, 23 & 26 as under:

> 12. In other words, a distinction must be drawn between the sustainability of a claim and the maintainability of the action as a summary suit. The negation of the former does not entail the negation of the latter. A suit can be said to fall outside the ambit of Order XXXVII only if the relief claimed therein is based on an action the nature of which does not fall within the classes specified in Order - XXXVII, Rule 1(2). A relief cannot be said to fall outside the ambit of Order XXXVII, Rule 2 merely because the quantum thereof is excessive, so long as the nature of the relief falls within the clauses specified in Order XXXVII, Rule 1(2).
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> 13. If the quantum of the claim in suit is not sustainable it is but a factor to be considered by the Judge while deciding and passing an order on, the summons for judgment. The tests for the exercise of jurisdiction while passing an order on a summons for judgment having settled in a plethora of cases including of the Apex Court. In this reference, we are not concerned with the same.
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> 23. ....

. Thus, the Division Bench expressly held that even when a part of the claim is unsustainable, it is not open to the Court to pass a decree for that part of the claim for which there is no defence and unconditional leave to defend for that part of the claim for which there is some defence.

. By the same process of reasoning, it would be open in such a case for the Court to pass a conditional order in respect of that part of the claim which the Court finds to be sustainable and unconditional leave for that part of the claim for which the Court finds there is some defence. That this may be done is clear from the plain language of Order XXXVII, Rule -3. There must however be a caveat added here. In such a case it would logically follow that the consequence of non-fulfillment of the condition would apply only to that part of the claim which the Court considers sustainable and not to that part of the claim in respect of which unconditional leave is granted.

26. ....**The object underlying the summary procedure is to prevent unreasonable obstruction by a defendant who has no defence.** The order is, however, confined to the suits Courts of negotiable insturments and is confined to the superior courts. Rule 1 is being substituted to provide for extending the summary procedure to the trial of the specified classes of suits by all Courts. (Emphasis supllied).

7. In the result, Defendant Nos.1 & 2 are allowed to defend the suit on the condition that they deposit an amount of Rs.96,000/- within a period of eight weeks from today. In the event the said amount is not deposited

within the period stipulated, the plaintiff would be entitled to apply for the ex-parte decree.

8. Suit to be placed for ex-parte decree so far as the defendant Nos.3 to 5 are concerned.

(V.M.KANADE,J.)

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